



Notre Dame Law Review

Volume 56 | Issue 4

Article 1

4-1-1981

Judicialization of Trade Law

Peter D. Ehrenhaft

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

Peter D. Ehrenhaft, *Judicialization of Trade Law*, 56 Notre Dame L. Rev. 595 (1981).

Available at: <http://scholarship.law.nd.edu/ndlr/vol56/iss4/1>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The "Judicialization" of Trade Law

Peter D. Ehrenhaft*

I. The Importance of Foreign Trade

A. Current Trade Scene

The modern world has been likened to a "global village," a metaphor brought home to us by images from far-flung places racing across our television screens. But if telecommunications media comprise the windows of that village, trade constitutes its common currency.

Regardless of our predilections, our dependence on foreign sources of supply is not a matter of theory or prediction but a settled fact. The most publicized example, of course, is oil, which flowed into our country at a rate exceeding 6.7 million barrels per day in 1980.¹ We now rely on imports for 40% of our petroleum needs. For certain strategic minerals, the percentages are higher: 50% of our tungsten, 57% of our mercury, 62% of our zinc, 77% of our nickel, 81% of our tin, 92% of our chromium, 93% of our bauxite and aluminum, 98% of our manganese, and fully 100% of our industrial diamonds come from abroad.² These items are neither exotica nor luxuries. Cobalt, nickel, and manganese, for example, are crucial raw materials in the production of alloy steels used in machine tools, gas turbines and jet engines. Trade thus has a profound bearing on our national security and industrial well-being.

As a matter of elementary economics, the United States must export goods to generate enough foreign exchange to be able to import what we need and want from other nations. Similarly, since foreign countries must obtain U.S. dollars to purchase our goods, we must provide access to our markets for foreign traders. In 1980 we spent approximately 244.8 billion dollars to buy merchandise abroad, and sold 220.6 billion dollars worth of our exports to our trading partners.³ The percentage of our gross national product devoted to foreign trade has doubled since 1970, and should increase substantially—perhaps even double again—in the next decade.

The world's increasing economic interdependence has obvious political ramifications. Our sanctions against Iran, for example, were economic ones, including trade restrictions requiring the cooperation of numerous allies. When Russian troops marched into Afghanistan, our response was not military but mercantile, consisting primarily of severe reductions in exports of agricultural

* Member of the New York and District of Columbia bars. Member, Hughes Hubbard & Reed; Deputy Assistant Secretary and Special Counsel (Tariff Affairs), U.S. Department of the Treasury (1977-79). The author wishes to acknowledge with sincere appreciation the invaluable assistance of Roger P. Fendrich, an associate of Hughes Hubbard & Reed and a member of the District of Columbia bar.

This article is adapted from the White Memorial Lecture delivered at the Notre Dame Law School on January 30, 1981.

1 U.S. DEPARTMENT OF COMMERCE, 4 BUSINESS AMERICA No. 3 at 4 (Feb. 9, 1981).

2 *The Shaky Supply of Key Minerals*, BUS. WEEK, March 12, 1979, at 61.

3 U.S. DEPARTMENT OF COMMERCE, *supra* note 1, at 4.

commodities and high technology products. Now more than ever before trade has become an instrument of our foreign policy.

We may employ this instrument as a carrot as well as a stick. When developing nations seek preferential treatment under our trade laws, we must be prepared to make delicate decisions. Even aside from humanitarian objectives (some 900 million people in the less developed countries are classified as living in "absolute poverty"⁴), steady economic development is needed to ensure political stability in many regions of the world, including that of our Latin American neighbors. Their expanding economies provide the fastest growing markets for many of our exports, including technology with which our own or other industrialized markets may be saturated. If the trade of developing nations does not generate sufficient foreign exchange earnings to enable them to pay for their needs, now including \$500 billion in debt service—debts largely incurred for imported oil—the economic leverage of oil-producing countries can only increase.⁵ Both as outlets for our technology and equipment and as sources for crucial raw materials, developing nations require sensitive, finely balanced adjustments in our trade policies.

But today's pace of change is such that adjustments are harder to accomplish and more expensive than ever before. As efficient competitors proliferate throughout the world, our technological prowess is challenged even in our home markets. Twenty years ago, there was little foreign steel in the United States; by the end of the 1970's foreign manufacturers had captured close to one-half of all Western markets, and the United States imported over twenty million tons per year.⁶ Despite import restrictions, foreign textile products currently comprise 12% of our domestic consumption.⁷ Passenger car imports have increased from 16% of domestic production in 1973 to 38% of domestic production in 1980.⁸ And these bare figures do not begin to indicate the magnitude of the adjustments occasioned by changing competitive conditions. With U.S. auto production down 35%, more than 300,000 auto workers have been laid off since 1978.⁹ When United States Steel Corporation decides to close a plant in Utah, 5,500 steelworkers and another 11,000 in support jobs are unemployed, causing a billion dollar decline in Utah's economy.¹⁰ Entire cities become "outdated" as their industrial hearts respond arrhythmically to the pace of change.

It may be pleasing in theory to suggest that market forces and the "invisible hand" will ultimately make the appropriate adjustments. But the idea of "government as caretaker," born in the Depression and brought to fruition during a period of unprecedented economic prosperity, has given us rising expectations for stability and security which we will not easily relinquish. Developments of the sort witnessed over the past decade—deterioration of our comparative trade posi-

4 Samuelsen, *Don't Break the Bank*, 12 NAT'L J. 1025 (1980).

5 Bowen, *Closing the Trade Gap Could Take Ten Years*, FORTUNE, July 14, 1980, at 134.

6 *Hearing on Effects of Steel Industry Closing on Small Businesses and Local Communities Before the Senate Select Committee on Small Business*, 96th Cong., 1st Sess. 5 (1980) (statement of Sen. Orrin Hatch) [hereinafter cited as *1980 Hearings*].

7 FTC STAFF REPORT, EFFECTS OF RESTRICTIONS ON U.S. IMPORTS: FIVE CASE STUDIES AND THEORY, 139 (1980).

8 Petition for Relief of Ford Motor Co. at 21-22, *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, USITC Pub. 110 (Dec. 1980), 45 Fed. Reg. 85194 (1980).

9 *Id.* at 2.

10 *1980 Hearings*, *supra* note 6, at 5.

tion, the oil embargo and the tenfold increase in the price of imported fuel, deficits in our merchandise trade, massive inflation, loss of the value of the dollar, declines in productivity—seem thrust upon us, not of our own making and involving forces so large that they cry out for government involvement.

B. *Trade in the Past: The Legal Approach*

If, as a recent Commerce Department publication reminds us, Americans are simply not accustomed to thinking of themselves as part of the world economy, it is because for much of our history we could afford to be parochial. Foreign trade has always involved less of our gross national product than it does elsewhere.¹¹ In a land of enormous size and seemingly limitless natural resources, we could believe in self-reliance; more importantly, we could practice it. The frontier was not only a laboratory for developing native customs and institutions, as Frederick Jackson Turner taught us, but it also provided a natural safety valve for internal pressures. Problems of adjustment could always be solved by internal growth, by "going West."

Whatever problems remained could be resolved, we believed, by our system of law. In the 1830's de Tocqueville observed that America's legal profession already constituted its "aristocracy," and that the language and spirit of the law permeated American culture. "It must not be forgotten," de Tocqueville wrote of lawyers, "that if they prize the free institutions of their country much, they nevertheless value the legality of those institutions far more; they are less afraid of tyranny than of arbitrary power."¹² A speaker at a recent discussion of the comparative competitive positions of the Japanese and U.S. auto industries suggested the surging success of the Japanese is partly due to two facts: first, that in Japan there is one lawyer serving every 10,000 citizens; while in the United States there are twenty; and second, that 400 engineers per 10,000 citizens do design and logistics work in Japan, compared to seventy here.¹³ We have a brain drain toward law rather than production; a devotion to arguing rather than doing. It is perhaps no accident that the very first law enacted by our Congress, the Judiciary Act of 1789, established the courts and provided work for lawyers. And lawyers are as busy at it today as then.

But we are also beginning to sense reactions to an excess of laws and regulations, to overcrowded court dockets, to the flood of law school graduates. Chief Judge Paul Buchanan of the Indiana Court of Appeals has vividly described how the public is drowning in tides of trivial lawsuits, citing among many the case two college seniors brought against their university because their shower curtains were inadequate.¹⁴ In a perceptive talk, former Attorney General Edward Levi deplored the obligations of our courts to become, in effect, receivers of our schools, prisons, hospitals and (why not?) sick communities as once they presided over bankrupt railroads.¹⁵ Chief Justice Warren Burger's Annual Report cites a by-now familiar 100 percent increase in just ten years in the case loads of the

11 See, e.g., J. VOLPE, *ASSESSING U.S. COMPETITIVENESS IN WORLD MARKETS* 1 (1979).

12 I A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (Aldine ed. 1901).

13 Hope, *Eight Vie in World Auto Market*, *AUTOMOTIVE NEWS*, Jan. 12, 1981, at 7, col. 3.

14 Buchanan, *Can the Judiciary Solve Everybody's Problem?*, *SWARTHMORE C. BULL.*, Nov., 1980, at 1.

15 E. Levi, *The Sovereignty of the Courts*, at 15 (July 1980) (unpublished lecture at the Salzburg Seminar on American Law and Legal Institutions).

federal courts of appeal.¹⁶

Nonetheless, we retain a confidence in law as a check on "arbitrary power." We still cling to legal processes—with all their transparency and neutrality—as ultimate arbiters in the determination of public policy. Sometimes, in an excess of devotion, we create legal procedures precisely to permit our politicians to avoid taking responsibility for making difficult choices.

In the field of international trade, the Trade Agreements Act of 1979¹⁷ and the recent conversion of our humble Customs Court into an exalted Court of International Trade¹⁸ demonstrate our long-standing faith in the power of legal machinery. It is a faith, I believe, that deserves questioning.

Although we are not alone in the world in committing our trade problems to a legal process, much of the international legal regime in this area is of our own making. As a recent article in the *New York Times* aptly observed, "[i]n the post-war world, American law, like the American dollar, passed as common currency."¹⁹ Even in the midst of World War II we had resolved, along with Great Britain, to create machinery to promote international cooperation in the field of trade. What resulted from postwar negotiations was the General Agreement on Tariffs and Trade (GATT),²⁰ consisting of both a set of legal agreements and an ongoing organization.

On paper, GATT contained commitments on maximum tariffs and a general principle of nondiscrimination embodied in a Most-Favored-Nation clause. But worldwide social, political, and economic conditions would not long remain frozen in the mold envisioned in 1947. With rapidly changing conditions and an enormously enlarged membership, GATT, like many other legal institutions, had to adapt to survive. An interesting dichotomy has emerged. On the one hand, the old reliance on legal rules has been replaced by a greater stress on the search for consensus. Equity has replaced justice and accommodation has supplanted retaliation as the guidelines for GATT responses.²¹ On the other hand, GATT has just concluded an enormous new effort at rulemaking and institution-building in the American image.

The Multilateral Trade Negotiations were concluded in 1979 after more than four years of hard bargaining to expand and perfect the GATT regime. These negotiations focused on the spread of a variety of preferential tariff agreements and *non*-tariff trade barriers that had become the paramount source of trade problems as tariff levels everywhere receded in significance. Specifically, two major categories of non-tariff barrier issues had to be addressed. On the one hand, access to markets was being restricted by a variety of tactics, including protectively tailored customs valuation codes and stringent product standards that discriminated—intentionally or not—against imports. On the other hand,

16 W. BURGER, CHIEF JUSTICE'S END OF THE YEAR STATEMENT 13 (1980).

17 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 5, 13, 19, 26 and 28 U.S.C.).

18 Customs Court Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727 (amending 28 U.S.C. § 251).

19 Birenbam & Johnson, *U.S. Law Under Fire*, N.Y. TIMES, Nov. 26, 1980, at 19A, col. 1.

20 General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 182 [hereinafter cited as GATT].

21 The dichotomy was well illustrated by an Indonesian diplomat who spoke scornfully of the Americans' symbol of justice as a "blindfolded woman with a sword"—the last person in the world he would trust to dispense justice. He said his nation's symbol of justice was a large shade tree under whose benevolent branches everyone could seek shelter from the fierce noon sun.

in a time of slack demand and worldwide recession, nations were increasingly tempted to promote exports in an effort to shift their domestic problems overseas and to earn dollars with which to buy oil.

In essence, the problems of insuring access to markets and of curing the "exportation" of internal adjustment pressures mean that international competition can flourish only if it is conducted in a fair and open manner that avoids "beggar thy neighbor" approaches. True to our traditions, our efforts to find a solution seized instinctively upon legal remedies. Codes were enacted to combat the "dumping" of underpriced goods and the subsidization of inefficient producers,²² and incidentally to avoid arbitrary valuation and standardization practices.²³ Thus we arrive at our legal point of departure. For if the recent changes in our Antidumping and Countervailing Duty laws²⁴ represent the problems of international trade writ small, they provide us with an instructive case study of the dangers of applying legal forms and processes to matters of trade policy.

II. New Wine in Old Bottles: Current Trade Laws Use Traditional Means to Deal with New Phenomena

A. *The Law of Countervailing Duties*

"Countervailing duties" are duties imposed to offset grants or subsidies conferred by foreign sources on producers of imported merchandise. The theory is that subsidization distorts trade patterns and discriminates against U.S. producers of competitive goods. Yet much of the rest of the world—and, it must fairly be said, the United States itself—view the subsidization of industry and agriculture as a legitimate exercise of national policy.²⁵ All nations now shape their domestic economy and, in the process, many encourage the growth of particular sectors—in particular those that produce for export. Why, then, should our trading partners defer to our negative views of subsidization? The answer is that for a long time they did because they had to.

1. History of Countervailing Duty Law

Since U.S. countervailing duty legislation antedated the GATT, it was exempted from the GATT regime under a grandfather clause.²⁶ As early as 1890, a countervailing duty law was passed to protect domestic sugar interests against a subsidy granted exporters of Russian sugar specifically to overcome the high U.S. protective tariff.²⁷ The first general countervailing duty statute, adopted in the

²² Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *done* April 12, 1979, MTN/NTM/W/236; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* April 9, 1979, MTN/NTM/W/232.

²³ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, *done* April 12, 1979, MTN/NTM/W/229/Rev. 1; Agreement on Technical Barriers to Trade, *done* March 29, 1979, MTN/NTM/W/192/Rev. 5.

²⁴ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, tits. I, X (to be codified in scattered sections of 19 U.S.C.).

²⁵ Agreement on Interpretation and Application of Articles VI, XVI, and XXIII, *supra* note 22, art. 11:1 at 21.

²⁶ *See* Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 308.

²⁷ Tariff Act of 1890, ch. 1244, § 237, 26 Stat. 584.

Tariff Act of 1897,²⁸ authorized the Secretary of the Treasury to impose duties on dutiable goods equal to the net amount of any subsidy on exportation bestowed by a foreign government. Since the law was ostensibly intended to combat what was regarded as inherently "unfair"—namely, requiring domestic producers to compete against foreigners receiving their government's financial aid—no "injury" to the domestic industry arising from the subsidized imports needed to be established to trigger the countervailing duty mechanism.

By the 1920's, the law was expanded to permit the Secretary to levy duties on imports subsidized by *any* foreign source, public or private.²⁹ Further, benefits no longer had to be tied to exportation to be countervailed, since manufacturing and production subsidies were also brought within the scope of the law. Throughout this early period and until 1974, great discretion was vested in the Secretary to define and take action against foreign subsidization. A number of factors, however, counseled prudence in the Secretary's use of this power.

First, the absence of an injury test made the Secretary reluctant to affront our foreign trading partners by stretching the law to its theoretical limits. Under the GATT, no countervailing duties could be imposed unless the subsidization caused or threatened "material injury" to a competing domestic industry.³⁰ Because U.S. law required no such showing of injury to domestic producers, the erection of import barriers through countervailing duties despite lack of injury to domestic producers was viewed abroad as blatant protectionism. Theories of free trade, undistorted by subsidies, were unconvincing.

Second, subsidies are widely viewed as desirable levers of social and economic change. Under GATT, for example, the only checks upon domestic subsidies had been notification and consultation procedures³¹—checks largely ignored in practice. As the role of governments in economic planning becomes more pervasive, it becomes possible to find "subsidization" at every turn: U.S. authorities have found them in regional development programs,³² research and development aid to industry,³³ and tax incentives³⁴ to help sectors in the economy deemed vital to a nation's welfare. Stringent enforcement of countervailing duties as a sanction against foreign governments' involvement in such efforts could be viewed by those governments as an unwarranted interference in their internal affairs.

2. Injury and "Discipline": A Trade-Off

The lack of an injury standard in U.S. law became increasingly unacceptable to our trading partners; at the same time, their recalcitrance in accepting "discipline" on subsidies was unacceptable to a United States Congress concerned with safeguarding domestic industry against subsidized competition. The

²⁸ Tariff Act of 1897, ch. 11, § 5, 30 Stat. 205.

²⁹ *E.g.*, Tariff Act of 1913, ch. 16, § IV(E), 38 Stat. 193, and the act superseding it, the Tariff Act of 1922, ch. 356, tit. III, § 303, 42 Stat. 935 (repealed by the Tariff Act of 1930, ch. 497, tit. III § 651, 46 Stat. 762). The current version is at 19 U.S.C.A. § 1303 (West 1980).

³⁰ GATT, *supra* note 20, at art. VI:5.

³¹ GATT, *supra* note 20, at art. XVI:1.

³² *ASG Industries, Inc. v. United States*, 610 F.2d 770 (C.C.P.A. 1979).

³³ *See, e.g.*, *Certain Optic Liquid Level Sensing Systems from Canada*, 44 Fed. Reg. 1728 (1979) (final countervailing duty determination).

³⁴ *See, e.g.*, *Bromine and Brominated Compounds from Israel*, 43 Fed. Reg. 56746 (1978) (final countervailing duty determinations).

Trade Act of 1974³⁵ represented a temporary compromise. On the one hand, the Treasury Secretary was authorized to waive countervailing duties during a four year period in contemplation of concluding trade agreements to reduce trade barriers.³⁶ On the other hand, for the first time, the Secretary was placed under time limits for acting on complaints, and complainants were afforded the right to judicial review of negative Treasury determinations.³⁷ Thus, the 1974 Act foreshadowed future developments: the waiver provisions amounted to a tacit acknowledgement that an injury test was needed, while the time limits and judicial review provisions indicated that the Secretary's virtually unbridled discretion was to be brought under the rein of law.

The 1974 Trade Act provided the legal basis for U.S. participation in multilateral negotiations to establish international rules governing subsidies. The Multilateral Trade Negotiations were primarily concerned with negotiating a trade-off in which the U.S. would adopt an injury test if its trading partners would accept rules moderating subsidies and their impact on international trade.

3. Current Countervailing Duty Law

The result of these negotiations, insofar as they became implemented in U.S. law, was the Trade Agreements Act of 1979,³⁸ which significantly revises U.S. practice in the countervailing duty area. If the changes constitute a mosaic, it is one structured by the transformation of administrative discretion into a more rule-bound, adversarial process.

For the first time, the term "subsidy" has been subjected to statutory definition.³⁹ In addition, various "offsets" which formerly had given the Treasury Department considerable flexibility in calculating subsidies have been eliminated.⁴⁰ All decisions are ultimately subject to judicial review.⁴¹ Abbreviated statutory timetables, coupled with the need to provide a record sufficiently documented to be fit for judicial scrutiny,⁴² give the new administering authority (now part of the Commerce Department rather than the Treasury Department) much less room for maneuverability in tempering the law's application.

Internationally, countervailing duty disputes are treated as matters to be resolved between governments. Under the Trade Agreements Act, however, while the administering authority may initiate a countervailing duty investigation *sua sponte*,⁴³ the alternative process—and one likely to remain the rule, as in the past⁴⁴—is for an interested party to initiate an investigation by petition. In

35 The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. §§ 2101-2487 (1976)) and in scattered sections of 5, 26 and 28 U.S.C.).

36 *Id.* § 331 (amending the Tariff Act of 1930, § 303(d), 19 U.S.C. § 1303(d) (1976)).

37 *Id.* (amending the Tariff Act of 1930, § 303(a)(4), 19 U.S.C. § 1303(a)(4) (repealed by Pub. L. No. 96-39, 93 Stat. 144, 190 (1979))).

38 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (to be codified in scattered sections of 19 U.S.C.).

39 *Id.* § 101 (adding § 771(5) to the Tariff Act of 1930, 19 U.S.C.A. § 1677(5) (West 1980)).

40 *Id.* (adding § 771(6), 19 U.S.C.A. § 1677(6) (West 1980)).

41 *Id.* § 1001(a) (adding § 516A, 19 U.S.C.A. § 1516a (West 1980)).

42 *Id.* (adding § 516A(b)(2), 19 U.S.C.A. § 1516a(b)(2) (West 1980)).

43 *Id.* § 101 (adding § 702, 19 U.S.C.A. § 1671a (West 1980)).

44 Executive disinclination to initiate countervailing duty proceedings has rested on the generally sensible "squeaky wheel" theory—that unless an industry complains of a problem, the United States government ought not to create problems. Moreover, lack of complaint may foreshadow inadequate cooperation by the domestic industry in the injury phase of the proceedings. But under § 101 of the Trade Agreements

short, whether the product in question be butter cookies from Denmark⁴⁵ or manhole covers from India,⁴⁶ an investigation will typically be compelled by a segment of the affected domestic industry. Foreign firms will have every reason to be drawn into the fray, either to deny their utilization of proffered benefits or to submit data on prices and customers to counter domestic claims of material injury. Thus, commercial adversaries will to a large extent supplement if not replace governments as the principal parties in countervailing duty actions.

In tune with the adversarial posture of the proceedings, administrative procedures have become increasingly judicialized hearings, replete with briefs and legal argumentation.⁴⁷ With certain limited exceptions, participants' business records and the administering authority's entire file—particularly of *ex parte* meetings with its decisionmakers⁴⁸—must be accessible. Only in certain narrowly circumscribed circumstances can an investigation be suspended or settled "out of court."⁴⁹

At virtually every stage in the proceedings, judges will be looking over the shoulders of the administrators. Preliminary countervailing duty determinations—including decisions not to institute an investigation or to extend the time limits of investigations, International Trade Commission findings that there is no reasonable indication of material injury, and the administering authority's determinations that there is no reasonable basis to believe subsidization exists—all will be subject to interlocutory review.⁵⁰ Parties can appeal to the courts to order disclosure of confidential information.⁵¹ And because all final determinations will be subject to "on the record" review under a substantial evidence standard upon challenge by an interested party,⁵² administrative processes must, of necessity, become formal and self-conscious preliminaries to judicial resolutions.

Related to the subject of countervailing duties is an area in which current solutions are immune to comment since they do not yet even exist. I refer to the

Act of 1979, *id.* (adding § 777, 19 U.S.C.A. § 1677f (West 1980)), the administering authority is obliged to maintain a library of foreign subsidy practices to facilitate private filings, *id.*, 93 Stat. at 187 (to be codified at 19 U.S.C. § 1677f), and the related Senate Report urges the administering authority not to hesitate before self-initiation, S. REP. NO. 249, 96th Cong. 1st Sess. 14, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 400. Such self-initiation might occur if a foreign government lured a domestic producer to build a plant to manufacture goods for export to the United States (*e.g.*, if the Michelin tire plant that was the object of the proceeding in X-Radial Steel Belted Tires from Canada, 38 Fed. Reg. 1018 (1973), had been American owned) and the other American producers—for whatever reason—declined to file. Reducing such international contests for plant locations has been a high priority of the United States government.

45 Butter Cookies from Denmark, 43 Fed. Reg. 956 (1978) (final countervailing duty determination).

46 Certain Iron Metal Castings from India, 45 Fed. Reg. 66915 (1980) (final determination of material injury).

47 Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (adding § 774 to the Tariff Act of 1930, 19 U.S.C.A. § 1677c (West 1980)).

48 *Id.* (adding § 777(a)(3), 19 U.S.C.A. § 1677f(a)(3) (West 1980)).

49 *Id.* (adding § 704, 19 U.S.C.A. § 1672c (West 1980)).

50 *Id.* (adding § 516A(a)(2)(B), 19 U.S.C.A. § 1516a(a)(2)(B) (West 1980)).

51 Elaborate regulations concerning access to confidential information are codified at 19 C.F.R. § 355, pt. B (1980). *See also* Connors Steel Company v. United States, 2 I.T.R.D. 1129 (BNA) (Cust. Ct. 1980) (No. C.R.D. 80-09). Connors Steel Company, a domestic steel company, contested an administrative determination that certain Belgian steel beams were not being sold in the United States at less than fair value and requested production of business information submitted by steel manufacturers under a pledge of confidentiality to the Customs Service. After the Government's motion for an order barring disclosure, Connors Steel moved to compel discovery. The United States Customs Court granted that motion, reasoning that the most equitable solution was to permit disclosure in a manner which would allow information to be examined by lawyers for Connors Steel for litigation purposes but would forbid further disclosure.

52 Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (adding § 516A(a)(2) to the Tariff Act of 1930, 19 U.S.C.A. § 1516a(a)(2) (West 1980)).

problem of coping with trade from state-controlled economies. When the price levels of components in the productive process are uniformly established by government decree, *all* products may be considered "subsidized" by the state. Under regulations once proposed by the Treasury Department (but since withdrawn by the Commerce Department), subsidy determinations would have been based on a finding of sales at "less-than-fair-value" under the antidumping laws, using a constructed-value formula based upon similar merchandise produced in a non-state-controlled economy at a comparable stage of economic development.⁵³ This is the approach finally sanctioned by the GATT Code on Subsidies.⁵⁴ The many technical problems involved in administering the formula reflect the conceptual difficulties of quantifying government "aid" when government involvement is omnipresent. But at least the formula applies a standard, developed after much effort in the context of the infamous antidumping case of *Golf Cars from Poland*.⁵⁵ The formula is premised on the view that if imports from state-controlled economies are priced at less than reasonable competitive value, domestic competitors do not care whether the rubric under which the cure is administered is that of "countervailing duty" or that of "antidumping," a topic to which we now turn.

B. *Antidumping Law*

1. History of Antidumping Law

Antidumping law had its origins in the xenophobic World War I era, fanned by the fear that European cartels would flood American markets with cheap, stockpiled merchandise, financing such U.S. sales through the high priced home market sales the cartels controlled. The Antidumping Act of 1916,⁵⁶ which condemns importation of goods at unfair price levels, requires proof of an intent to injure industry or to monopolize trade in the United States. Although the Act carries criminal sanctions, for all practical purposes it has been a dead letter.

Congress tried again in 1921. Eschewing criminal punishment and private civil damage remedies, the 1921 Act provided for sanctions in the form of antidumping duties.⁵⁷ Enforcement of the new law was taken out of the courts and lodged in the Treasury Department. Administrative proceedings could be initiated by private parties complaining of injury caused by dumped imports, whereupon the Treasury Secretary would conduct an inquiry to determine whether foreign merchandise was being sold at less than its "fair value."⁵⁸ Like a line drive judged by a baseball umpire, a price was "fair" if the Secretary said so.

Although the language of the Antidumping Act of 1921 was amended from time to time, the contours of antidumping law—and its problems—remained

⁵³ Proposed Revision of the Customs Regulations Relating to Countervailing Duties, 44 Fed. Reg. 57044, 57047 (1979). This proposal was not included in the final regulations. *See* 45 Fed. Reg. 4932, 4933 (1980).

⁵⁴ Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *done* April 12, 1979, MTN/NTM/W/236, pt. IV at 28.

⁵⁵ *See* *Electric Golf Cars from Poland*, 45 Fed. Reg. 39581 (1980) (determination of no further injury) for a history of this extended proceeding.

⁵⁶ 15 U.S.C. § 72 (1976).

⁵⁷ The Antidumping Act of 1921, § 209, 42 Stat. 11 (codified as amended at 19 U.S.C. § 168 (1976) (repealed by Pub. L. No. 96-39, 93 Stat. 193 (1979)).

⁵⁸ *See* 19 U.S.C. § 160 (1976) (repealed and replaced by 19 U.S.C.A. § 1673 (West 1980)).

fairly constant through the years. Perhaps the central problem was that antidumping action focused on sheer *price differences* between the exporter's sales in his home market and his sales here, regardless of whether the U.S. price levels were competitive. If an exporter is a monopolist at home or if his home market is otherwise sheltered, his prices here *ought* to be lower than abroad. So long as those prices are competitive in the American market, it can be argued, American consumers should be able to reap the benefits. And the legislative history of the Trade Act of 1974 does suggest that such dumping should be regarded as "technical" and noninjurious.⁵⁹ The International Trade Commission even pays occasional heed to the suggestion—although it is not expressly a part of the law.

Current administration of the law follows the initiation of a proceeding by the particular domestic producers who invoke the statute,⁶⁰ and who effectively "control the action" thereafter. Thus, proceedings may be brought regarding imports from a country which is not the primary source of a dumping problem. For example, the large case brought in 1980 by United States Steel⁶¹ regarding a variety of carbon steel products focused solely on shipments from the European Economic Community although many thought more tonnage, at larger margins more likely to cause market disruption, was coming from Japan, Canada and certain other countries. This may suggest that private interests play too large a role in shaping antidumping remedies. Ironically, however, the role is also too small, since domestic complainants are not compensated for any injuries they may suffer at the hands of dumping predators. As a result, domestic producers have little to lose in initiating complaints, but nothing to gain in recoupable damages.

The U.S. Treasury, rather than injured domestic competitors, benefits from the imposition of antidumping duties. Under the law, once the Secretary makes a finding of less-than-fair-value sales, the precise magnitude of the duty to be extracted is calculated in accordance with exquisitely detailed statutory characterizations of "foreign market value" and "purchase price."⁶² The time required to conduct these complex calculations necessarily allows relief to be delayed. Also, investigations to establish the appropriate variables often compel the U.S. government to confront foreign firms and governments at politically undesirable or inconvenient times. But no real flexibility is accorded government administrators to apply overriding considerations of economic or foreign policy. The law says: Go forward and damn the torpedoes.

2. The 1974 Act: Cost of Production Insight

For fifty years, the antidumping regime was concerned exclusively with price differentials between a foreign exporter's domestic and U.S. sales. The Trade Act of 1974 introduced a new economic insight based on the concept of cost recovery.⁶³ Henceforth, if the Secretary determined that significant sales in

59 See S. REP. NO. 1298, 93rd Cong., 2d Sess. 179 (1974).

60 19 U.S.C.A. § 1673a(b) (West 1980); 19 C.F.R. § 353.36 (1980).

61 See Certain Carbon Steel Products From Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, 45 Fed. Reg. 21404 (1980) (institution of preliminary antidumping investigation).

62 19 U.S.C.A. §§ 1677a-1677b (West 1980); 19 C.F.R. § 353, pt. A (1980) (covering 14 columns of fine print at 45 Fed. Reg. 8191 (1980)).

63 Trade Act of 1974, *supra* note 35, § 321(d) (amending Antidumping Act of 1921, *supra* note 53,

the domestic market were at prices that did not allow *costs* of production to be recovered within a reasonable period of time, then those prices could not establish a "fair" value for the goods in question. Rather, either remaining sales not below cost or their "construed value" would be used to establish the critical standard of comparison, the constructed value being equal to the total cost of materials plus added margins of ten percent for general expenses and eight percent for profits. This approach complements a policy of preserving fair competition, since persistent sales below cost are a badge of inefficiency.

A company that consistently fails to recover costs should not long survive. Indeed, it cannot if it is not being assisted—propped up, if you will—by its government or some other external source of support. Many countries, including our own, help maintain failing sectors of the economy for a variety of historic, developmental, and security reasons. Moreover, when a major industry fails, the social costs of adjustment, including unemployment and dislocation, may be such that a producer or its government will prefer to maintain a fixed output while absorbing the losses. Export sales at a loss then shift the problems abroad, effectively "exporting unemployment." This was the real target of the below-cost-sales amendment to the Antidumping Act, and this section is now its most significant provision.

It should be noted, however, that in times of contracting demand (such as all industrial countries are currently experiencing), it may be entirely rational for producers to sell at less than fully allocated costs. If demand fluctuations are due to a local business cycle, for example, prices sufficient to recover variable costs may minimize long-run production costs over the entire cycle. The law has been inadequately developed to reflect the requisite sensitivity to differences between marginal costs, average variable costs, average total costs, and other conceptual permutations, however.

One fresh approach for coping with a rising tide of antidumping disputes was initiated in 1978 in response to complaints from the American steel industry. A trigger price mechanism (TPM) grounded on production costs of the world's most efficient industry as a whole—the Japanese—established a reference price for all carbon steel imports into the United States.⁶⁴ The TPM promised an "automatic" investigation of possible dumping whenever significant steel imports, regardless of their point of origin, fell below the trigger price. In calculating trigger prices, the Treasury Department sought to incorporate the economic insight that fixed costs should be allocated over a period coinciding with a realistic investment planning cycle rather than with the arbitrary period of investigation instigated by an antidumping petition.⁶⁵ But a troubled steel industry has

adding § 205b, codified at 19 U.S.C. § 164(b) (1976)) (repealed and replaced by 19 U.S.C.A. § 1677b(b) (West 1980)). The important consideration for a finding of "dumping" is the margin between the "foreign market value" of the merchandise exported to the United States and the "purchase price" of that merchandise in the United States. Naturally, a lower "foreign market value" reduces the possibility of a dumping margin. Domestic sales uniformly made at less than the cost of production could, if used in the calculation, so reduce the "foreign market value" of the goods that no margins of dumping would be found, even if all sales in both the home market and the United States were at a loss. Consistent sales at a loss are not regarded as "fair" competition in either domestic or international trade.

64 See 43 Fed. Reg. 1464 (1978) (Treasury Department announcement of base prices to be used in the trigger price mechanism).

65 See 44 Fed. Reg. 59742, 59748 (1979) (proposed regulation 19 C.F.R. § 153.7). The proposed regulation would have established one year as the norm for this purpose but would have allowed evidence of a

not been enamored of the theoretical niceties of the system, and Treasury's TPM was abandoned in favor of a dumping complaint against the Europeans.⁶⁶ The Commerce Department then decided to add a further pull to "triggers": a so-called "anti-surge" mechanism.⁶⁷ On that basis the dumping case was withdrawn in October 1980 and TPM reinstated.⁶⁸

3. Current Antidumping Law

Under the Antidumping Act of 1921, a cabinet-level official was given responsibility for determining whether imports were being sold in the United States at less than their fair value.⁶⁹ Since "fair value" was left undefined, the determination was necessarily as much a matter of trade policy as of prices—an exercise of political judgment rather than mere arithmetic.

Under the Trade Agreements Act of 1979 "fair value" remains undefined. Nevertheless, the term has come to mean the same as "foreign market value,"⁷⁰ one of those long-winded concepts for which our Internal Revenue Code, among many laws, is justly famous. While the determination of "foreign market value" now includes some leeway by permitting averaging techniques⁷¹ and the disregard of "insignificant" adjustments,⁷² these are largely matters of technical, not normative, discretion. The upshot of current law and administration is that antidumping complaints are likely to stand or fall on the basis of a lower-level bureaucrat's price computations, rather than on a senior official's comprehensive market analysis. Discretion is further confined by the need to establish a record which can withstand the judicial review available to any "interested party" who chooses to appeal an antidumping determination.⁷³

Administrative judgment thus has less space under the new trade law; it also has less time. A principal objective of the 1979 Act was to expedite both antidumping and countervailing duty proceedings. Since shorter time periods are presumably a spur to more vigorous enforcement,⁷⁴ the Secretary of Commerce

longer period. (In the TPM, a five-year period was used.) The "period of investigation" in most proceedings is a six-month period comprising the 150 days before and 30 days after the first day of the month in which an antidumping petition is filed. See 19 C.F.R. § 353.38(a) (1980).

66 Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, 45 Fed. Reg. 21404 (1980) (institution of preliminary antidumping investigation).

67 See 45 Fed. Reg. 66834 (1980) (reinstatement of the steel trigger price mechanism).

68 See Carbon Steel Rolled Sheet, Hot Rolled Sheet, Galvanized Sheet, Plate and Structural Shapes from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, 45 Fed. Reg. 66833 (1980) (petitions withdrawn).

69 The Antidumping Act of 1921, § 201, 42 Stat. 11.

70 See H.R. REP. NO. 317, 96th Cong., 1st Sess. 59 (1979). The House Report states: "The term fair value is not defined in current law nor in the bill. The Committee intends the concept to be applied essentially as an estimate of 'foreign market value' during the period of investigation so as to provide the Authority with greater flexibility in administration of the law." While "fair value" can be less precise than foreign market value, the methodology used to determine either must be essentially identical. See 19 C.F.R. § 353.1 (1980).

71 19 U.S.C.A. § 1677b(1) (West 1980).

72 *Id.* § 1677b(2).

73 The Department of Commerce is charged with maintaining the official record of antidumping proceedings. See 19 C.F.R. § 353.25(a) (1980). Any "interested party" who is a party to the proceeding may appeal an antidumping determination. See 19 U.S.C.A. § 1516a(1) and (2) (West 1980).

74 For example, see the statement of Rep. John H. Buchanan, Jr., vice chairman of the congressional steel caucus, lamenting "the unfortunate reticence of [the United States] Government to enforce the trade laws which the Congress has passed to protect this country from the deleterious effects of price discrimination in foreign commerce." *Multilateral Trade Negotiations: Hearings Before the Subcomm. on Trade of the House*

now has twenty (rather than thirty) days to determine whether an investigation will commence;⁷⁵ the International Trade Commission must rule on whether there is a reasonable indication of injury within forty-five days;⁷⁶ a preliminary determination of whether there have been sales at less than fair value must ordinarily fall within 160 days (rather than six months) after an investigation is initiated;⁷⁷ and other statutory timetables are similarly abbreviated. At this early stage it is difficult to predict whether the "rush to judgment" will in fact produce forceful administration, or whether it will have other, unanticipated consequences—such as providing harried administrators with an incentive to eliminate weak cases as quickly as possible. The recent decision of the Court of International Trade reversing the International Trade Commission's determination of "no reasonable indication of injury" in the case of *Rail Cars from Italy and Japan*⁷⁸ is a case in point; it was based in large part on alleged "oversights" of relevant facts in the record before the agency.

Clearly, the same basic set of procedures—with relatively minor adjustments to timetables for extraordinarily complex cases⁷⁹—must accommodate all antidumping disputes, regardless of size. But it is questionable whether mechanisms which may be appropriate for determining whether coathangers from Canada⁸⁰ are being dumped are adequate when the challenge involves virtually all the steel imported from Europe. The sheer complexity of the biggest cases is illustrated by the Japanese TV fiasco, in which the Treasury Department, after finding that dumping had occurred, fell more than seven years behind in assessing duties.⁸¹ Cases which are "mountains"—involving such industries as steel, automobiles, and televisions—are not amenable to treatment with a set of jewelers' needles. On the other hand, cases which amount to "molehills" hardly warrant potentially damaging government-to-government confrontations.

Administrative proceedings in the antidumping area, like those in the area of countervailing duties, are now more "judicial" than ever before. Interested parties are granted the right to submit briefs as well as present oral arguments at hearings.⁸² All information relied upon in making a final dumping determination must normally be verified,⁸³ and there is provision for maximum disclosure

Comm. on Ways and Means, 96th Cong., 1st Sess. 332 (1979); *Dumping: House Committee Members, Witnesses Clash Over Antidumping Enforcement of Steel*, [1980] 8 U.S. IMPORT WEEKLY (BNA), at A-1. See also Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1(c)(4) (congressional statement of purposes) (to be codified at 19 U.S.C. § 2502(4)).

75 19 U.S.C.A. § 1673a(c) (West 1980).

76 *Id.* § 1673b(a).

77 *Id.* § 1673b(b)(1).

78 See *The Budd Co., Ry. Div. v. United States*, 15 Cust. B. & Dec. 68 (Dec. 29, 1980) (Bulletin No. 4 (Jan. 28, 1981)). This case reversed the ITC's determination of "no reasonable indication of injury" in *Rail Passenger Cars and Parts Thereof Intended for Use as Original Equipment in the United States from Italy and Japan*, 45 Fed. Reg. 11942 (1980).

79 19 U.S.C.A. § 1673b(c) (West 1980).

80 See *Steel Wire Coat and Garment Hangers from Canada*, 44 Fed. Reg. 29, 990 (1979) (determination of no reasonable indication of injury).

81 See *Television Receiving Sets, Monochrome and Color from Japan*, *antidumping investigations initiated*, 33 Fed. Reg. 8851 (1968), *determination of sales at less than fair value*, 35 Fed. Reg. 18549 (1970), *determination of injury*, 36 Fed. Reg. 4576 (1971) (Investigation No. AA1921-66, TC Pub. No. 367), *notice of finding of dumping* (T.D. 71-76, 36 Fed. Reg. 4597 (1971)). See also *Oversight of the Antidumping Act of 1921: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 8 (1977) (statement of Robert H. Mundheim, General Counsel, U.S. Treasury Department).

82 19 U.S.C.A. §§ 1677c(a), 1675(a), (c), (d) (West 1980).

83 *Id.* § 1677e.

of data submitted to or considered by administering authorities. Although investigations may be terminated by a complaining party's withdrawal of petition, strictures hedge in the capacity of administrators to negotiate settlements.⁸⁴ Here too executive discretion retreats before the advancing march of law.

III. "Judicialization"—A Questionable Course

A. *Benefits of the Existing System*

The preceding description of current antidumping and countervailing duty law reveals a clear trend: the process of policymaking in U.S. international trade is being increasingly transformed into a system of quasi-adjudication. The Trade Agreements Act of 1979, along with other new developments such as the Customs Court Act of 1980,⁸⁵ signal the conversion of flexible, policy-sensitive administrative instruments into the traditional tools and techniques of litigation. Plowshares are being beaten into legal swords.

Even aside from the pecuniary rewards that trade lawyers may anticipate, there are undeniable advantages associated with the new regime. Perhaps the most general benefit is that with the adoption of a judicial model for resolving disputes, an apparent depoliticization of the trade arena results.

From a domestic perspective, this means that Congress and the Executive Branch can avoid tough decisions by deferring to impersonal (and presumably impartial) administrative/judicial mechanisms. Since in an adjudicatory process the decisionmaker is *obliged* to be insulated from extrinsic influences, a "hands off" policy becomes a virtue born of necessity. From an international perspective, the case-by-case approach mandated by the new regime creates the impression that the larger problems of trade relations will neatly resolve themselves into delimited disputes, each to be dealt with individually and on its "merits." The whole process is structured to give observers the comfortable impression that a set of neutral and accepted rules will be applied disinterestedly to yield consistent results—just the sort of comfort that legal systems are designed to give.

In addition to being quasi-adjudicatory processes, countervailing duties and antidumping inquiries, though ordinarily instigated by private petitioners, are carried out by U.S. government agencies. This too has its salutary effects. If complaints regarding trade practices were left entirely in the control of private parties, challenged foreign competitors would likely be very reluctant to submit sensitive information regarding their business practices, including price data and customer lists. For sake of comparison, witness the extraordinary lengths to which antitrust defendants will go in fending off discovery of competitive data. While some recent court decisions ordering disclosure of business information submitted under a pledge of confidentiality by foreign manufacturers cut the other way⁸⁶ (for they will surely inhibit future submissions), those accused of dumping and subsidization should at least theoretically be more compliant when the investigation is conducted under the imprimatur of the U.S. government.

Another feature that may make the current system attractive is its forward-

⁸⁴ *Id.* §§ 1673c(b), (c), (d).

⁸⁵ Customs Court Act of 1980, Pub. L. No. 96-417, § 101 (amending 28 U.S.C. § 251).

⁸⁶ *See, e.g.*, *Connors Steel Co. v. United States*, 2 ITRD 1129 (BNA) (Cust. Ct. 1980); *Southwest Fla. Winter Vegetable Growers Ass'n v. Miller*, 1 ITRD (BNA) 1142 (D.D.C. 1979).

looking orientation. Because remedies are limited to duty assessments on future imports, there is no preoccupation with expiating past "guilt." In addition to streamlining the required inquiry, this limitation on liability may compensate foreign firms for the fact that U.S. complainants are shielded from counterclaims.

In perspective, then, the current adjudicatory model has its inviting aspects. Principled decisionmaking undoubtedly appeals to us—if only as a matter of principle. Transforming trade disputants into litigants, administrators into judges, and proceedings into trials makes for a brave new world. But it may not be the best of all possible worlds. It may not even be as good as the old one.

As a prelude to the suggestions which follow, it is worth noting that rule-bound, adjudicatory systems have their own peculiar characteristics which, like those of the digestive system, modify raw materials in the very process of assimilating them. Thus, because the adjudicatory process is focused on a particular complaint, particular parties, and particular facts, it is not concerned to—indeed, is not supposed to—issue forth judgments on alternative scenarios or "hypothetical" cases. Because adjudication is piecemeal and incremental, extending only to the issues presented, it may artificially isolate and separate factors which are actually interconnected. Because decisions tend to become sanctified as precedent (the law is loath to give the appearance of fickleness), backtracking and changing course is inhibited. Because adjudicatory bodies are passive, only acting when litigants call, their agendas are shaped by the vagaries of private initiative. Yet because they are supposed to be responsive (they *must* act when litigants call, and within a delimited period of time), decisions may be hasty, forced, or made on an *ad hoc* basis. Finally, the need to appeal to preexisting rules or general principles lends to legal processes an essentially conservative nature; they adapt to external changes, if at all, in an *ex post facto* manner.

All this is not to say, of course, that an adjudicatory model should be entirely abandoned in the trade area. Rather, what is needed is a recognition of the adjudicatory model's distinctive biases and limitations. The question is whether and to what extent such a model is adapted to the needs of the subject matter. In turn this question depends upon what we think our trade laws should do.

B. *Perceived Deficiencies*

The ultimate objective of U.S. trade law in the countervailing duty and antidumping areas can be stated with breathtaking simplicity: to preserve fair competition in the American market. There are other subsidiary goals, not the least of which is some measure of protection for U.S. industry in a world not yet completely open to trade based solely on comparative advantage. Nonetheless, the animating premise of countervailing duty and antidumping rules is that price discrimination and subsidization unfairly affect competition by requiring domestic producers to meet artificially low import prices.

But if the goal is clear, the effectiveness of current law is much less so. Data simply do not exist to demonstrate that individual determinations of subsidization or dumping, much less the mere existence of the countervailing duty or antidumping laws, have provided meaningful preventive or remedial relief to those industries invoking the law, or that they have cleansed the market of trade-distortive practices. What we do know is that the procedures are costly to both the

government and to affected parties, that the number of cases is growing, and that there is no perceptible abatement of industry complaints.⁸⁷ It is a notorious fact that under the older trade law regime, the biggest cases—those involving the largest trade volumes—never yielded concrete benefits: automobile antidumping proceedings were discontinued in 1976,⁸⁸ petitions in a series of steel cases were withdrawn in 1978⁸⁹ and 1980⁹⁰ after adoption and reintroduction of the trigger price mechanism, and most of the countervailing duty actions in the textile industry eventuated in negative determinations in 1979.⁹¹

We also know that under the new regime there continues to be no provision for the compensation of injured parties. Whether small added duties—in an era in which exchange rates may fluctuate more within a week than the entire margin of dumping to be remedied—serve a deterrent or other useful purpose is unknown. The high cost of participating in these proceedings and the risks involved in releasing sensitive business data would seem to constitute equally (and perhaps more) important reasons for foreign concern about our trade laws. Our efforts to be fair pursuant to new codes liberalizing trade may actually have resulted in the erection of a new “non-tariff barrier” known as legal expenses.

What is surprising is that in the past, countervailing duty and antidumping actions actually concluded have generally been peripheral to our major economic concerns.⁹² But if those laws are in fact proper only for those types of cases, is the enormous relative increase in resources needed to administer an adjudicatory process, as now contemplated, worthwhile? According to recent General Accounting Office estimates, the traditional program cost \$1.1 million in 1975, \$1.4

87 *Administration of the Antidumping Act of 1921: Hearings on the Assessment and Collection of Duties Under the Antidumping Act of 1921 Before the Subcomm. on Trade of the House Ways and Means Comm.*, 95th Cong., 2d Sess., 4 (1978) (statement of Robert H. Mundheim, then General Counsel of the U.S. Treasury Department and the delegate of the Secretary for decisionmaking under the Act).

88 Automobiles from Belgium, *discontinued*, 41 Fed. Reg. 34982 (1976) (discontinuance based on commitment of exporters to revise prices); Automobiles from Canada, *discontinued*, 41 Fed. Reg. 34983 (1976) (same); Automobiles from France, *discontinued*, 41 Fed. Reg. 34984 (1976) (same); Automobiles from Italy, *discontinued*, 41 Fed. Reg. 34985 (1976) (same); Automobiles from Japan, *discontinued*, 41 Fed. Reg. 34986 (1976) (same); Automobiles from Sweden, *discontinued*, 41 Fed. Reg. 34987 (1976) (same); Automobiles from the United Kingdom, *discontinued*, 41 Fed. Reg. 34988 (1976) (same); Automobiles from West Germany, *discontinued*, 41 Fed. Reg. 34989 (1976) (same).

89 Certain Carbon Steel Sheets, Plates, Pipes, and Tubes, and Structural Products from Japan, 43 Fed. Reg. 9212 (1978) (petitions withdrawn).

90 Carbon Steel Cold Rolled Sheet, Hot Rolled Sheet, Galvanized, Flat and Structural Shapes from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, 45 Fed. Reg. 66833 (1980) (petitions withdrawn).

91 Certain Textiles and Textile Products from Malaysia, *negative determination*, 44 Fed. Reg. 41001 (1979); Certain Textiles and Textile Products from Mexico, *negative determination*, 44 Fed. Reg. 41003 (1979); Certain Textiles and Textile Products from Singapore, *negative determination*, 44 Fed. Reg. 35334 (1979). An affirmative determination was made in Certain Textiles and Textile Products from Pakistan, *countervailing duty imposed by T.D. 79-188*, 44 Fed. Reg. 40884 (1979).

92 *See, e.g.*, Steel Wire Coat and Garment Hangers from Canada, *antidumping investigation initiated*, 44 Fed. Reg. 23623 (1979), *determination of “no reasonable indication of injury or likelihood of injury,”* 44 Fed. Reg. 29990 (1979), *terminated*, 44 Fed. Reg. 35335 (1979); Automotive and Motorcycle Repair Manuals from the United Kingdom, *antidumping investigation initiated*, 43 Fed. Reg. 35139 (1978), *determination of “a reasonable indication of injury,”* 43 Fed. Reg. 40935 (1978), *terminated*, 43 Fed. Reg. 45932 (1978) (termination based on provision of “Florence Agreement” that such merchandise shall be imported free of any “customs duties or other charges”); Ampicillin Trihydrate from Spain, *countervailing duty investigation initiated*, 43 Fed. Reg. 22479 (1978), *countervailing duty imposed by T.D. 79-90*, 44 Fed. Reg. 17484 (1979); Steel Wire Strand for Prestressed Concrete from India, *antidumping investigation initiated*, 42 Fed. Reg. 60034 (1977), *withholding of appraisal and determination of sales at less than fair value*, 43 Fed. Reg. 23672 (1978), *determination of no injury*, 43 Fed. Reg. 38951 (1978).

million in 1976, and \$1.1 million in 1977.⁹³ The cost of the trigger price mechanism, estimated at \$1.9 million in 1978, more than doubled these costs within a single year to a total of \$3.9 million.⁹⁴ The amount and quality of manpower needed to investigate, adjudicate and then "enforce" the new laws properly within the tightened time limits and in light of increased caseloads, requires at least a further fourfold increase in those costs.⁹⁵ There is no guarantee that the benefits will rise to the level of the costs or that anyone is even asking for the data upon which to make the needed judgment. We have never known and do not know today what trade is actually affected by these cases, how much in duties we actually collect, or how many of our exports are adversely affected by foreign antidumping actions. Such analyses are time consuming and boring. As a recent study by Common Cause on the efficacy of reports by the General Accounting Office has observed, there is no political profit in oversight.⁹⁶ Programs count; follow-up clouds the eyes.

C. *Suggestions For A Different System*

In order to fashion trade laws which are both true to their mission and effective in operation it is necessary, not to extirpate all of the recent "judicializing" trends, but to assign them a more appropriate role in the system. In this regard, a fundamental distinction must be made between smaller cases in which (ironically) the adjudicatory trend has not gone far enough, and the "big" cases in which it has gone too far.

For typical small cases involving neither enormous volumes of trade nor sensitive issues in international relations, an adjudicatory procedure seems most workable and fitting. Since most small antidumping cases are essentially disputes between private parties concerning their respective behavior in the U.S. market, simple private damage actions should suffice, provided government intervention is possible if larger trade policy issues come into play. Since countervailing duty cases by their nature address foreign government programs, they are less susceptible to private suit. However, it seems advisable to allow a party claiming competitive injury resulting from a subsidy to bring an action against the beneficiary of the party allegedly receiving the benefits.

Aside from the fact that it would be in tune with our recent political predilection to reduce the degree of government intervention in the economy, the introduction of a traditional litigation format in the minor cases forming the bulk of the workload serves several useful functions: It would avoid the artificial time limitations imposed by current administrative procedures, entitle injured parties

93 U.S. GENERAL ACCOUNTING OFFICE, U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921: REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL 4 (1979).

94 *Id.*

95 Treasury Department Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, authorized funds for 130 new position for antidumping and countervailing duty administration, *see* S. REP. NO. 229, 96th Cong., 1st Sess. 14 (1979), compared to the 79 positions working in that area (including a large group solely devoted to the trigger price mechanism) that were transferred from the Treasury Department to the Commerce Department pursuant to § 2(a) of Presidential Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273, 69274 (1979).

96 COMMON CAUSE, ADDING BARK TO THE BITE: A COMMON CAUSE STUDY OF THE GAO, THE GOVERNMENT'S WATCHDOG 17 (1981).

to recover damages, and even contribute to good international relations by reducing the needless irritation of frequent government face-offs.

The "big" cases are another matter. These are disputes which, because of the quantity of the affected trade or the quality of the issues, raise fundamental questions about the direction of our international relations, national security, labor policy, domestic economic planning, or foreign affairs. To what extent do certain kinds of foreign practices—say, absence of environmental protection or lack of minimum wages—constitute subsidization of the goods produced under these conditions? What will trade sanctions do to our non-trade relationship with an exporting nation, especially when that relationship is at a critical juncture? How will our efforts to curb inflation be affected by massive antidumping reverberations shutting out products that provide competition and fill consumer needs unrecognized or unfilled by our producers? How can we continue to promote development of the less developed countries if we must apply countervailing duties to the very products we are urging—and helping—them to make and sell abroad? Such problems are not amenable to mechanical solutions; they are not within the special purview of either price calculating technicians or juristic generalists; and they most definitely should not be within the exclusive province of private parties.

In short, these are cases in which the government has an indispensable role to play. In addition to requiring the sort of comprehensive vision which adjudicatory processes are ill-suited to provide, the problems posed by these cases require essentially political solutions: they demand an assessment of competing interests and an accommodation between a diversity of domestic needs and international tensions. Perhaps only a senior executive official is properly capable of determining whether certain forms of trade relief are in the national interest (indeed, the President himself is already designated to make this determination under the 1974 Trade Act in so-called "market disruption"⁹⁷ and "escape clause"⁹⁸ cases). As in those cases, perhaps Congress should have the final word in determining whether relief is justified. The recent condemnation by the United States Court of Appeals for the Ninth Circuit of one-house vetoes might be avoided if joint resolutions were required.⁹⁹ But more to the point, judicial review would be no more warranted here than in other areas where the appropriate solutions are political.

The bifurcated model proposed above in which typical small cases go to court while large or policy-sensitive cases are pulled off the adjudicatory assembly line, undoubtedly presents difficulties of its own. The very distinction between "big" and "ordinary" cases is not easily drawn. Without government participation in private suits, it may be difficult to serve "process" on foreign defendants or to collect and verify data. Private industries may complain if governmentally-imposed "political" solutions lead to injuries in the form of terminated trade contracts, although some form of insurance might be made available to cover such contingencies. The United States provides such insurance for con-

97 19 U.S.C. § 2251(b)(1) (Supp. 1978).

98 *Id.* § 2436.

99 *See Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).

tracts terminated due to foreign government actions;¹⁰⁰ "political risk" insurance seems equally suitable vis-a-vis actions of our own bureaucrats. I pretend to possess neither a philosopher's stone nor a blueprint. But I do think we are not likely to devise an improved system for handling trade disputes if we are not willing to confront squarely the inadequacies of the present system.

By way of summary, let me highlight the problems I detect by contrasting what we have now with what might be:

<u>Existing System</u>	<u>Needed System</u>
<i>Reactive</i> to complaints due to failure of adjustment.	<i>Preventive</i> planning to forestall complaints and anticipate needed adjustments on both sides of international borders.
<i>No compensation</i> to those unfairly injured.	<i>Compensation</i> to the injured to aid in adjustment process.
<i>Microspecific</i> in quantifying individual transaction details.	<i>General</i> approach to problems, handling specifics as part of a comprehensive program.
<i>Structured</i> rules and procedures leading to single remedy.	<i>Flexibility</i> in applying rules and developing remedies.
<i>Confrontational</i> in both domestic and international arenas.	<i>Supportive</i> of trading partners and our mutual efforts to adjust to new conditions.

Looking across these columns, one cannot be satisfied with the current direction of the law, especially with the trend I have identified as "over-judicialization." I am reminded of the little girl in Boston who, when asked where she would like to travel when she grew up, replied, "Why should I want to travel when I am already *there*?" I am less convinced than that little girl that we have already arrived. In international trade law, it is precisely where we already are that should make us want to travel the road of reform.

¹⁰⁰ See, e.g., II A. LOWENFELD, INTERNATIONAL PRIVATE INVESTMENT § 3.41 (1976). See, also 22 U.S.C.A. § 2194 (West 1979).